Supreme Court, U.S.
FILED
JUL 8 1998
OFFICE OF THE CLERK

No. 97-1977

In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC., and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF-INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT, OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.'S, BRIEF IN OPPOSITION

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July 8, 1998

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LIST OF PARTIES

This is a Brief in Opposition to a Petition for Writ of Certiorari under Rule 15, wherein two judgments are sought to be reviewed on a writ of certiorari to the same Court and involve identical or closely related questions. The Petitioners in this case are: The YWCA of Oklahoma City, Century Martial Arts Supply, Inc., E & H Transfer, Inc., City Glass Co., Flip's Wine Bar & Trattoria, Inc., Mangum Brick Company, Ronnie's Signs, Inc., Dalmarc Enterprises Incorporated, Barbara J. Wilson, Oklahoma Steel & Wire, Inc., C & H Power Line Construction, Inc., Chris Hunt Water Hauling, Inc., John Vance Motors, Inc., Troy Westnidge, Inc. and Colbert Nursing Home, Inc. The Respondents in this case are Self Insurers' Management Group and Oklahoma Employers Safety Group, S.I.A. All parties before the Oklahoma Supreme Court are before this Court.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

PROPOSITION I: PETITIONER COLBERT FAILED TO RAISE BEFORE THE TRIAL COURT AND PROPERLY PRESERVE ON APPEAL TO THE OKLAHOMA SUPREME COURT THE ISSUES IT NOW RAISES ON PETITION FOR WRIT OF CERTIORARI 6

PROPOSITION II: THE OKLAHOMA SUPREME COURT PROPERLY APPLIED THE MCCARRAN-FERGUSON ACT 9

SUBPROPOSITION IIA: WHETHER THE PETITIONERS ARE ENGAGED IN THE BUSINESS OF INSURANCE IS IRRELEVANT 13

SUBPROPOSITION IIB: THE EXEMPTION OF THE MCCARRAN-FERGUSON ACT WAS PROPERLY APPLIED 15

PROPOSITION III: THE OKLAHOMA LEGISLATURE DRAFTED SECTION 149.1.C TO BE RETROACTIVE AND THE OKLAHOMA SUPREME COURT'S APPLICATION OF SECTION 149.1.C DID NOT DIVEST PETITIONERS OF A VESTED RIGHT 17

CONCLUSION 21

APPENDIX ..... App. 3

TABLE OF AUTHORITIES

Page

CASES

Barnett Bank of Marion County, N.A., v. Nelson, 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed. 2d 237 (1996) 13

Federal Trade Com'n v. National Casualty Co., 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958).....10, 11

Holloway v. Peat Marwick, Mitchell & Co., 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014 on remand 900 F.2d 1485 (10th Cir. 1990), cert denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958..... 12

Howlett by and through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)..... 11

Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District, 464 P.2d 748 (Okl. 1968) 18

Resolution Trust Corporation v. Wright, 868 F.Supp. 301304 (W.D.Okl. 1993) 18

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969).....12, 13

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, L.Ed.2d 647 (1982).....14, 15

STATUTES

FEDERAL

Securities Act of 1933 (15 U.S.C. §77a et seq.) 9, 10, 11, 13, 16

McCarran-Ferguson Act (15 U.S.C. §1012) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C.A. §1011 16

15 U.S.C. §1012(b) 10

OKLAHOMA STATUTES

85 O.S. §149.1 ..... 10, 15, 16, 19

85 O.S. 1996 §149.1.C 5, 6, 8, 17, 20

OTHER AUTHORITIES

Rules of the Administrator of the Workers' Compensation Court 1

Rule 3, Section 3(e) 4

Rule 3, Section 4 4

Rule 3, Section 8 ..... 3, 4

Rule 3, Section 11 4

Rule 14(g)(i) of the Rules of the Supreme Court of the United States 6, 9, 20

United States Constitution, Amendment XIV, §1 17

Oklahoma Supreme Court Rule 1.36(g) 8

STATEMENT OF THE CASE

Factual Background

Oklahoma Employer Safety Group ("OESG") is a self-insurance association approved by the Oklahoma Workers' Compensation Court and the provisions of title 85, section 149.1, et seq. of the Oklahoma Statutes. Under the authority of those statutes the State of Oklahoma's Workers' Compensation Court established an extensive set of rules (hereinafter "the rules") governing the formation and the conduct of self-insurance associations.[1] Both Oklahoma Employers Safety Group and Self-Insurers' Management Group are established, regulated and governed by the foregoing rules and statutes.

Businesses who wish to join a self-insurance association must sign a contract for membership known as an "Indemnity Agreement and Power of Attorney," the form of which must be approved by the Oklahoma Workers' Compensation Court. The rules require that all contracts contain provisions whereby members agree to assume and discharge, jointly and severally, all liability incurred by the association members under the Workers' Compensation Act; and grant the administrator of the association power of attorney to act for and bind the association in the performance of its operations.[2]

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[1] See Rules of the Administrator of the Workers' Compensation Court, at Appendix 22-48.

[2] See Rules of the Administrator of the Workers' Compensation Court, Rule 3 Section 2(L) and Section 12, at Appendix 28, 42.

Members of OESG contractually agree to pay all premiums due for workers' compensation insurance coverage and further agree to cooperate in any way with the association's periodic audits of the member's payroll records. *See contract at Appendix 13-21.* OESG as a self-insurance association, simply allows its members to pool their risk of workers' compensation liabilities as employers and, thereby, spread the risk of loss among a far larger group of businesses than an individual employer could do. Self-insurance associations also allow their members to avoid paying the profit built into large commercial insurance companies' premiums.

This case involves the failure of Petitioner, Colbert Nursing Home, Inc., to pay premiums due and owing to OESG for workers' compensation insurance coverage. This case also involves the exemption of self-insurance associations from the purview of federal securities regulations by the McCarran-Ferguson Act. While many states permit formation of self-insurance associations, only a few have enacted self-insurance association laws which are similar to that of the state of Oklahoma.

While the legal arguments presented in this matter are very similar, the facts of these two cases are completely different. Colbert Nursing Home signed an indemnity agreement with OESG to become a member of OESG and thereby obtain workers' compensation insurance coverage for its employees.[3] OESG provided insurance coverage to Colbert from August 25, 1994, through

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[3] See Indemnity Agreement and Power of Attorney, at Appendix 13-21.

March 1, 1996. Colbert's employees filed numerous claims and received substantial benefits as a result of OESG's coverage. Colbert failed to pay $58,060.00 worth of the insurance premiums to OESG. OESG sued Colbert Nursing Home to recover the unpaid workers' compensation insurance premiums.

Respondent, Self Insurers Management Association (hereinafter "SIMG") sued its members for a much different reason. SIMG was forced to sue its members for a 2.5 million-dollar assessment to help the association recoup its losses. The indemnity agreements provide for and allow associations to assess their members when the total amount of claims paid exceeds the premiums collected. *Unlike SIMG, OESG has never assessed its members.* However, when individual members of an association, like Colbert, fail to pay the premiums they owe, they hurt the association and the other members by lessening the association's ability to pay claims of the members' injured workers.

OESG disputes each and every allegation contained in Colbert's Joint Petition, at page five (5), numbered one (1) through four (4). OESG has throughout this litigation maintained that it did not offer and sell interests which by law could be construed as unregistered securities. As concerns allegation number one, OESG simply made membership in its association available through properly licensed independent insurance agents. Colbert sought out and applied for membership in the OESG association. OESG, like all self-insurance associations, is required by the Rule 3, Section 8, to file an annual report as a matter

of public record with the Oklahoma Workers' Compensation Court.[4] This annual report must contain a certified audit, performed by a certified public accountant, showing the financial condition of the association. OESG has always complied with this rule. Any interested person or member of the association may inspect this public record.[5] Examination of those audits would show any interested person that OESG has remained at all times on solid financial ground.

History of the Litigation

Colbert terminated its membership in OESG on March 1, 1996. After terminating its membership, Colbert requested OESG audit its account. The resulting audit revealed that Colbert owed OESG an additional premium of $72,469.00. Colbert refused to pay the premiums. OESG then applied Colbert's deposit of $14,409.00 to the unpaid balance.[6] On August 2, 1996, OESG sued Colbert to recover the remainder of the unpaid premiums, which total $58,060.00. Colbert filed its counterclaim on October 31, 1996, alleging that the contract for membership in OESG was an unregistered security in violation of the Oklahoma Securities Act and the Securities Act of 1933.

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[4] See Rules of the Administrator of the Workers' Compensation Court Rule 3, Section 8, at Appendix 34.

[5] See Rules of the Administrator of the Workers' Compensation Court Rule 3, Section 3(e); Rule 3, Section 4 and Section 8, at Appendix 29, 30, 34.

[6] Each member of the OESG association is required to pay a deposit of 25% of the first year's normal premium. See Rule 3, Section 11, at Appendix 41.

Colbert was granted summary judgment in the District Court on January 16, 1997. As noted in the Oklahoma Supreme Court's July 8, 1997, Opinion, the judgment entered by the trial court did not specify the grounds upon which Colbert was granted judgment. Pet. App. 18.

The Oklahoma Supreme Court reversed the trial court's grant of summary judgment to Colbert Nursing Home. The Oklahoma Supreme Court properly held that under the provisions of the McCarran-Ferguson Act, federal securities laws do not apply when a state's laws regulate and govern the conduct of an insurer. The Oklahoma Supreme Court did not *give* retroactive effect to Section 149.1.C. As the court stated in its ruling, it is clear from the wording of Section 149.1.C that the Oklahoma Legislature intended the statute to have retroactive effect. Pet. App. 7. More specifically, the Oklahoma Supreme Court determined the amendment embodied in Section 149.1.C was made to merely clarify what the Legislature perceived the law to have been since the passage of Section 149.1 in 1981. Pet. App. 8. Thus, contrary to the argument of the Petitioners, the Oklahoma Supreme Court simply applied Section 149.1.C as it found it.

REASONS FOR DENYING THE WRIT

The Court should not grant certiorari in this case for the following reasons:

1. The Oklahoma Supreme Court has not decided an important federal question in a way that conflicts with a decision of another state court of last resort, or of a United States court of appeals. The Joint Petitioners

do not even contend the ruling of the Oklahoma Supreme Court falls within the criterion of Rule 10(B) of the Rules of the Supreme Court of the United States.

2. The Oklahoma Supreme Court has not decided an important question of federal law that has not been, but should be, settled by this Court. Likewise, the Oklahoma Supreme Court has not decided an important federal question in a way that conflicts with relevant decisions of this Court. The Joint Petitioners have failed to show the Oklahoma Supreme Court decided a federal question in a way that conflicts with a relevant decision of this Court.

3. Petitioner Colbert failed to raise and properly preserve on appeal the issues it now asserts before this Court.

4. The Oklahoma Supreme Court has not denied the Petitioners protection of federal securities laws.

5. The Petitioners never argued before the trial court or the Oklahoma Supreme Court that retroactive application of Section 149.1.C would deprive them of their right to due process under the Fourteenth Amendment of the United States Constitution.

PROPOSITION I: PETITIONER COLBERT FAILED TO RAISE BEFORE THE TRIAL COURT AND PROPERLY PRESERVE ON APPEAL TO THE OKLAHOMA SUPREME COURT THE ISSUES IT NOW RAISES ON PETITION FOR WRIT OF CERTIORARI

The Rules of the Supreme Court of the United States, Rule 14(g)(i) require:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were first raised; the method or manner of raising them and the way in which they were passed on by those courts; . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Virtually all of the arguments presented in Colbert's Propositions I, IA, IB, and IC are raised for the first time in the Joint Petition for Writ of Certiorari. OESG maintained throughout the trial court proceedings that its insurance contract with Colbert was exempted from both the Oklahoma Securities Act and the Federal Securities Act of 1933. Colbert submitted three briefs to the trial court in support of its motion for summary judgment and in opposition to OESG's motion for summary judgment. Colbert's trial court briefs do not contain a glimmer of the legal arguments set forth in its Propositions I, IA, IB, and IC. Colbert never presented the trial court (and consequently the Oklahoma Supreme Court) with a rebuttal argument against the application of the McCarran-Ferguson Act to the facts of this case. *None* of the cases cited in Colbert's Joint Petition for a Writ of Certiorari, nor any of the legal arguments they support are found in the trial court record and the record on appeal. Therefore, the Oklahoma Supreme Court appropriately states, "Without citation of authority Colbert contends that Oklahoma Employers Safety Group violated federal securities laws." Pet. App. 20.

Petitioner Colbert's "Proposition II" argues its Fourteenth Amendment due process rights were violated. At no point in the trial court proceedings, or in the appellate court, did Colbert argue or allege that application of Oklahoma Statute Title 85, Section 149.1.C would work an impermissible deprivation of property rights upon Colbert in violation of the Federal Constitution. In fact, nowhere in Colbert's trial court briefs, or in the record on appeal is there even one citation to the due process clause of the Fourteenth Amendment to the United States Constitution.[7] Neither the trial court nor the Oklahoma Supreme Court passed decision on this question. Colbert now improperly raises the argument for the first time in its Petition for a Writ of Certiorari to this Court. Because Colbert's "due process" argument is not properly and timely raised, this Court is without jurisdiction to review the judgment in question on a writ of certiorari.

Because the Oklahoma Supreme Court did not consider or pass judgment on the federal questions now raised by Colbert before this Court, this Court is devoid of jurisdiction to review the Oklahoma Supreme Court's

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[7] On appeal from the trial court's ruling in favor of Colbert, OESG filed a motion with the Oklahoma Supreme Court requesting the appeal be retained for disposition by the Oklahoma Supreme Court, bypassing the Oklahoma Court of Appeals. OESG's motion was granted by court order on January 31, 1997. Pursuant to Oklahoma Supreme Court Rule 1.36(g), governing appeals of summary judgments, only the record from the trial court proceedings was considered on appeal by the Oklahoma Supreme Court. No additional briefs or legal arguments were submitted to the Oklahoma Supreme Court during the appellate process.

ruling on the questions presented. Colbert's Joint Petition for a Writ of Certiorari must be denied.

Because Joint Petitioners failed to timely raise and preserve these issues as required by United States Supreme Court Rule 14(g)(i), OESG objects to this Court's consideration of the Joint Petitioners' Petition on this ground alone, and requests this Court deny Joint Petitioners' Petition for Certiorari. Without waiving this objection, OESG submits the following Respondent's Brief.

PROPOSITION II: THE OKLAHOMA SUPREME COURT PROPERLY APPLIED THE McCARRAN-FERGUSON ACT

OESG has demonstrated that the federal questions the Joint Petitioners request this Court consider are not properly before the Court for review. However, assuming *arguendo* the Joint Petitioners did properly raise and preserve these arguments for review, OESG responds as follows.

The Petitioners essentially request this Court to ignore the clear provisions of the McCarran-Ferguson Act. Petitioners ask the Court to require Oklahoma self-insurance associations to comply with the Securities Act of 1933, despite the fact that Congress created the McCarran-Ferguson Act for the sole purpose of allowing the individual states to create and regulate entities such as self-insurance associations. In hopes of gaining the Court's attentions, the Joint Petitioners allege the Oklahoma Supreme Court has "re-written" the McCarran-

Ferguson Act. This is a gross and misleading accusation. The McCarran-Ferguson Act states, in pertinent part:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . .
>
> 15 U.S.C. §1012(b)

The Oklahoma Supreme Court noted the Oklahoma Legislature authorized the creation of self-insurance associations by enacting Oklahoma Statute title 85, §149.1. Pet. App. 20. Pursuant to Section 149.1, the Oklahoma Legislature provided that the Oklahoma Workers' Compensation Court would regulate such self-insurance associations. 85 O.S. §149.1; Pet. App. 20. Because the Oklahoma Legislature has enacted laws specifically to allow the creation and regulation of self-insurance associations, these state laws overseeing insurance associations cannot be invalidated, impaired or superseded by an act of the United States Congress, which does not specifically relate to the insurance business – i.e., the Securities Act of 1933. Pet. App. 20-21.

The Oklahoma Supreme Court's ruling is in direct compliance with Congress's mandate as embodied in the McCarran-Ferguson Act. The Supreme Court of Oklahoma cited *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958) as authority for its decision. Therein, the Court noted that each state in question had enacted legislation which prohibited unfair advertising by insurance companies. The states' legislation provided for the enforcement of those

laws through a scheme of administrative supervision. The Court found the provisions of Section 2(b) of the McCarran-Ferguson Act were satisfied by the creation of state regulatory laws governing the insurance business, thereby foreclosing federal regulation of the insurance business advertising practices in those states. *Federal Trade Com'n v. National Casualty Co.*, 357 U.S. at 564-565, 78 S.Ct. at 1262.

As stated in *Federal Trade Commission*, the states possess ample means to regulate the business of insurance within their boundaries. *Federal Trade Commission*, 357 U.S. at 564, 78 S.Ct. at 1262. The Oklahoma Supreme Court opinions recognize that Oklahoma has enacted legislation providing for the creation of self-insurance associations and their regulation by the Oklahoma Workers' Compensation Court. Under the clear mandate of the McCarran-Ferguson Act, no act of Congress, unless it specifically relates to the business of insurance, may invalidate, impair, or supersede any law enacted by a State, which regulates the business of insurance. Just as in *Federal Trade Commission*, the Oklahoma Supreme Court found the provisions of Section 2(b) of the McCarran-Ferguson Act were satisfied by state regulation and correctly determined the Securities Act of 1933 may not be applied to Oklahoma self-insurance associations.

The cases cited by Petitioners in their Propositions I, IA, IB, and IC are inapplicable and certainly not controlling authority on the specific facts and issues presented by this case.

Howlett by and through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), does not apply to

the instant situation. The Oklahoma Supreme Court's opinion did not disagree with the content of, nor did it refuse to recognize a superior federal law. The Oklahoma Supreme Court's opinion recognizes the federal authority of the McCarran-Ferguson Act, follows its provisions and correctly holds that state laws regulating insurance companies cannot be invalidated, impaired or superceded by the Federal Securities Act of 1933.

The Oklahoma Supreme Court's opinion should not follow the principle contained in *Holloway v. Peat Marwick, Mitchell & Co.*, 879 F.2d 772 (10th Cir. 1989 Okl.), cert. granted and vacated, *Peat Marwick Main & Co. v. Holloway*, 494 U.S. 1014 on remand 900 F.2d 1485 (10th Cir. 1990), cert. denied, *KPMG Peat Marwick v. Holloway*, 498 U.S. 958. Despite the Joint Petitioners' arguments, the Oklahoma Supreme Court's opinion did not displace the applicability of federal securities laws. Rather, it followed the intent of Congress and applied the McCarran-Ferguson Act to forbid federal securities laws from impairing a state law created for the purpose of regulating the Oklahoma self-insurance associations.

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed 2d 668 (1969), actually supports the Oklahoma Supreme Court's ruling in this matter. When insurance companies are engaged in the "business of insurance" the McCarran-Ferguson Act applies to preempt federal regulation which would invalidate state law regulating that business. The selling and advertising of insurance policies, the licensing of companies and their agents, the relationship between insurer and insured, the type of policy which can be issued, its reliability, interpretation and enforcement, are

all within the core of the "business of insurance" for the purposes of the McCarran-Ferguson Act. *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460, 89 S.Ct. at 568. Thus, state laws regulating the relationship between an insurance company and its policyholders, i.e., OESG and Colbert, are supreme and are not preempted by other federal legislation. That part of the *Securities and Exchange Commission* opinion cited by Colbert relating to Arizona's attempt to regulate the relationship between a stock holder and an insurance company, in which the stockholder owns stock, is inapplicable to the present case as OESG did not sell stock in its association.

Barnett Bank of Marion County, N.A., v. Nelson, 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed. 2d 237 (1996), involves a federal statute *which specifically relates to the business of insurance* within the meaning of the exception of the McCarran-Ferguson Act. Therein, a federal statute specifically granted national banks in small towns the authority among other things, to sell insurance. The statute preempted a diametrical Florida law prohibiting national banks from selling insurance in such situations. There is no language in the Securities Act of 1933 which, as stated by the Court in *Barnett Bank of Marion County*, "using ordinary English, one would say . . . specifically relates to the *'business of insurance.'* " 517 U.S. at 39, 116 S.Ct. at 1111. The Court's opinion in *Barnett Bank of Marion County* in no way supports Colbert's case.

SUBPROPOSITION IIA: WHETHER THE PETITIONERS ARE ENGAGED IN THE BUSINESS OF INSURANCE IS IRRELEVANT.

As concerns Colbert's Subproposition IB, Colbert's Joint Petition is the first time it has ever argued that

Colbert was not "engaged in the insurance business" so as to prohibit application of the provisions of the McCarran-Ferguson Act. The Joint Petitioners in their Subproposition IB do not allege that the trial court or the Oklahoma Supreme Court considered this argument and improperly denied them relief. Notwithstanding this fact, it is irrelevant whether the Joint Petitioners are engaged in the insurance business.

Colbert has never argued that OESG does not qualify for the preemption clause of the McCarran-Ferguson Act by not falling within the definition of "engaging in the insurance business." At the trial court level, OESG demonstrated that it was engaged solely in the business of insurance. App. 9-12 and 51-53.

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, L.Ed.2d 647 (1982) sets forth the criteria that courts must examine when determining whether an insurance company's activities fall within the core definition of the business of insurance for the purposes of exempting that activity from federal regulation under the McCarran-Ferguson Act. *Pireno* holds that if an insurance company's particular activity *falls outside* the business of insurance, that activity *may* be subject to federal regulation.

The Oklahoma Supreme Court ruled, in essence, that OESG falls squarely within the guidelines established by the Court in *Pireno*, by declaring:

> It is clear that Oklahoma Employers Safety Group's primary business was to provide workers' compensation insurance to its members, . . . "
>
> Pet. App. 21.

The Joint Petitioners' Subproposition IB is nothing more than a plea for a misguided interpretation and application of *Pireno* to this case. *Pireno* says nothing about the business practices of the insureds. It does not stand for the principle that the McCarran-Ferguson Act cannot be applied to this case to prevent the Joint Petitioners from receiving the protection of the federal securities laws.

SUBPROPOSITION IIB: THE EXEMPTION OF THE MCCARRAN-FERGUSON ACT WAS PROPERLY APPLIED

The opinion of the Oklahoma Supreme Court clearly shows that applying the Securities Act of 1933 to the facts of this case would invalidate, impair and supercede the provisions of 85 O.S. §149.1 et seq. of the Oklahoma Workers' Compensation Laws. Despite the fact that Colbert failed to raise any of the legal arguments contained in its Subproposition IC before the trial court and the Oklahoma Supreme Court, OESG briefly responds to Colbert's Subproposition IC.

The Oklahoma Supreme Court observed that the Oklahoma Legislature established a clear public policy that compensation to injured employees covered by the Oklahoma Workers' Compensation Act must be secured. Pet. App. 8. The Court found that the Oklahoma Legislature, in order to further this important public policy, established 85 O.S. §149.1 to allow for the creation of self-insurance associations and to provide for their regulation by the Oklahoma Workers' Compensation Court. Pet. App. 20.

Contrary to Joint Petitioners' assertion in their Subproposition IC, there is a logical explanation why the application of the federal securities laws will impair and impede Oklahoma's regulation of self-insurance associations. Oklahoma Statute title 85, §149.1 and the Oklahoma Workers' Compensation Court Rules governing self-insurance associations provide an extensive program for regulating self-insurance associations. Included within this regulatory system are criterion for the form and content of all contracts for membership in self-insurance associations, as well as a requirement that self-insurance associations disclose their financial status to the public. To require self-insurance associations to comply with both acts, (the Securities Act of 1933 and 85 O.S. §149.1) would be to simply ignore the clear mandate of the McCarran-Ferguson Act. Requiring self-insurance associations to comply with the Securities Act of 1933 would fly in the face of Congress's policy that the continued regulation by the several states of the business of insurance is in the public's best interest.[8]

As an aside, it should be noted that self-insurance association rules requiring they report their financial status to the public by filing certified audits with the Oklahoma Workers' Compensation Court, belies and eliminates Joint Petitioners' argument that they were deprived of protection or incapable of making an

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[8] 15 U.S.C.A. §1011 reads: Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

informed decision when joining a self-insurance association.

PROPOSITION III: THE OKLAHOMA LEGISLATURE DRAFTED SECTION 149.1.C TO BE RETROACTIVE AND THE OKLAHOMA SUPREME COURT'S APPLICATION OF SECTION 149.1.C DID NOT DIVEST PETITIONERS OF A VESTED RIGHT

As explained in Proposition I, Colbert never argued at the trial court level or on appeal that the due process clause of the Fourteenth Amendment should be applied to prevent them being divested of a "vested right." Thus, Colbert's "due process" argument is not properly before this Court and should be rejected for this reason alone.

Colbert also asks the Court to review the Oklahoma Supreme Court opinions upon the ground the opinions violated the provisions of the Oklahoma Constitution Article V, Section 52. At the trial court level, Colbert only half-heartedly argued that it possessed a "vested right" to its defense under the Oklahoma Constitution. However, Colbert fails to explain the meaning of a "vested right" as that term is used in relation to the Oklahoma Constitution.

Colbert also inaccurately argues that the Oklahoma Supreme Court retroactively applied Section 149.1.C to deprive them of their defense. The court applied Section 149.1.C in the manner which the Oklahoma Legislature intended it to be applied.

> "This amendment to §149.1 makes abundantly clear the Legislature's intention that the agreements of all members of all associations created under the terms of §149.1, including the

> Agreements at issue here, are not covered by the Oklahoma Securities Act."
>
> Pet. App. 7.

Even though the Oklahoma Legislature enacted Section 149.1.C to be applied retroactively, its application to this case did not deprive the Joint Petitioners of a "vested right" allegedly embodied in their securities law defense.

In fact, what Colbert contends is an "existing defense" to OESG's lawsuit, is actually nothing more than an untested legal theory. In order for an "existing defense" to take the form of a vested right, that defense must be supported by established common law or by statutory law in existence at the time the defense is first asserted. In order to have a vested right in a defense for the purposes of the Oklahoma Constitution, the defense must be established by either common law, statute, or by contract. *See Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, 464 P.2d 748, 755 (Okl. 1968); *Resolution Trust Corporation v. Wright*, 868 F.Supp. 301304 (W.D.Okl. 1993). Colbert fails to cite in its Joint Petition, and in fact, will find no Oklahoma statutory or common law supporting its "existing defense."

The Oklahoma Supreme Court's opinion correctly notes that without existing common law or statutory law supporting one's defense, one cannot be said to have a vested right in that defense. The Oklahoma Supreme Court's opinion is replete with statements concerning the failure of Colbert to put forth common law or statutory authority supporting its securities law defense.

> "[N]o express Oklahoma law made group self-insurance agreements subject to the Oklahoma

> Securities Act before the 1996 amendment to §149.1. In fact, it seems clear to us that the Legislature amended §149.1 to clarify what it perceived the law to have been since the passage of §149.1 in 1981."
>
> Pet. App. 7-8.
>
> "Defendants/Appellees do not suggest what it is that gave them a vested interest in the trial court's decision, and we see nothing that could have done so."
>
> Pet. App. 8.
>
> "Thus, there was no statutory or case law indication prior to the trial court's ruling to support Defendant/Appellees claim that Defendants/Appellees have a vested interest in having their Agreements deemed securities."
>
> Pet. App. 9.

These excerpts from the Oklahoma Supreme Court's opinions make it clear the court understood and considered the definition of a "vested right." The court's opinions point out that because Colbert fails to provide common law or statutory authority supporting its defense, the defense does not rise to the level of a vested right.

Colbert misleadingly argues it had a vested right in its defense under the provisions of the Oklahoma Securities Act. In truth, the Oklahoma Securities Act makes no mention of self-insurance association contracts, nor does it require such contracts be registered as securities.

Colbert never argued to the trial court that Article I, Section 10 (the "Contract Clause") of the United States

Constitution prevents the application of Section 149.1.C to this case. Colbert inappropriately raises this argument for the first time in its Joint Petition. Because this federal question argument was never presented to the Oklahoma Supreme Court, Colbert is barred from raising the "Contract Clause" as a defense at this time. Pursuant to United States Supreme Court Rule 14(g)(i), this Court is without jurisdiction to consider this argument. OESG hereby objects and defends against Colbert's "Contract Clause" proposition on this ground. Without waiving its objection, OESG would show the Court the "Contract Clause" is not a valid defense for Colbert.

As stated earlier, at the time OESG and Colbert contracted, no law was in force which made group self-insurance agreements subject to the Oklahoma and federal securities acts registration requirements. Again, it must be noted that Colbert cites no common law or statutory authority validating its claim that self-insurance association agreements are subject to the Oklahoma Securities Act registration requirements.

The enactment of Section 149.1.C certainly did not impair Colbert's contractual rights. Colbert admits it received workers' compensation insurance coverage for its employees. Colbert's employees workers compensation claims were paid by OESG. Colbert could not have relied upon the laws in existence at the time it contracted with OESG for support of its securities law defense because no such laws existed. In fact, as held by the Oklahoma Supreme Court, the law has always been that self-insurance association contracts are not subject to securities laws registration provisions. Pet. App. 7-8.

CONCLUSION

It is undisputed that Colbert received the benefit of its bargain with OESG. Colbert still refuses to pay its premiums. The entirety of this litigation, including Colbert's Joint Petition, is nothing more than an elaborate ruse concocted by Colbert to avoid fulfilling its contractual obligations to OESG. Colbert is hardly an "unsuspecting small business," but is a company that having received the benefits of its insurance coverage, simply does not want to bear the burden of paying fair premiums.

Colbert made absolutely none of the federal question arguments it presents in its Joint Petition to the Oklahoma courts and, thus, there are no federal questions properly presented to this Court by the Joint Petition. Colbert cannot claim to be ignorant of this fact. Colbert has improperly submitted a Petition for Writ of Certiorari to this Court knowing this Court to be without jurisdiction to consider the Petition. Colbert's Petition is a deliberate attempt to delay the administration of justice in this litigation.

The Oklahoma Supreme Court's decision is without flaw and correctly interprets and applies the law of Oklahoma, the McCarran-Ferguson Act, and the Securities Act of 1933, to hold that self-insurance association contracts are not subject to Oklahoma and federal securities laws registration requirements. The Oklahoma Supreme Court's application of a retroactive statute in this case did not violate Colbert's federal or state constitutional rights,

as their asserted defense, not being even vaguely supported at law, does not rise to the level of a "vested right."

Although the Oklahoma Supreme Court's decision is truly limited to application in the State of Oklahoma, if relied upon by other jurisdictions, the opinion will serve to further the McCarran-Ferguson Act's purpose of allowing the individual states the right to regulate the insurance business.

For the foregoing reasons, Oklahoma Employers Safety Group Self-Insurance Association respectfully requests that Colbert's Petition for Writ of Certiorari be denied.

Respectfully Submitted,

DON R. NICHOLSON II, OBA #6673
EAGLETON, NICHOLSON, PORDOS
& PARDUE, P.C.
228 Robert S. Kerr, Suite 220
Oklahoma City, Oklahoma 73102
(405) 236-0550
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Counsel of Record and Attorney for Respondent, Oklahoma Employers Safety Group, S.I.A.

APPENDIX CONTENTS

Plaintiff's (OESG) Motion for Summary Judgment .....App. 1

Oklahoma Employer Safety Group's Response to Colbert Nursing Home, Inc.'s Motion for Summary Judgment and Reply to Colbert Nursing Home, Inc.'s Response in Opposition to Motion for Summary Judgment of Oklahoma Employer Safety Group .....App. 5

Oklahoma Employer Safety Groups Supplemental Response to Colbert Nursing Home, Inc.'s Motion for Summary Judgment and Reply to Colbert Nursing Home, Inc.'s Response in Opposition to Motion for Summary Judgment of Oklahoma Employer Safety Group .....App. 49

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff,	)	Case No. CJ-96-5268
vs.	)	
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 30, 1996)

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") and moves this Court to enter summary judgment pursuant to Rule 13 of the Rules of the District Court for the reason that all matters on file in this action raise no substantial controversy as to any material fact.

STATEMENT OF MATERIAL FACTS

1. Colbert Nursing Home, Inc. ("Colbert"), contracted with OESG to receive workmen's compensation insurance coverage. SEE EXHIBIT "A," Application and Contract for Membership, attached hereto.

2. Colbert received such coverage from August 25, 1994, to March 1, 1996. SEE EXHIBIT "B" PARAGRAPH 2, Affidavit of Tom Mobley, attached hereto.

3. Colbert agreed to pay all premiums for its workers compensation insurance coverage. SEE EXHIBIT "A," page 3, paragraph 3.

4. On or about February, 1996, the Defendant wrote OESG to advise they were cancelling their workers compensation insurance coverage effective March 1, 1996. Defendant requested that OESG conduct its normal payroll audit "so that we [the Defendant] may reconcile *additional* or return premiums due from our expiring insurance with you." See EXHIBIT "B," paragraph 3.

5. Pursuant to Defendant's request, OESG did perform an audit of both fund years for which Defendant was provided workers compensation insurance. See EXHIBIT "B," paragraphs 5, 6 and 7.

6. The amount of premium owed by Defendant is determined by Defendant's total payroll for each period to determine Defendant's total payroll. The audits use the Defendant's books and records. When the audits were completed they were signed by an authorized representative of the Defendant who attested that the audit was true and correct. OESG relied on these representations. SEE EXHIBIT "B", paragraph 7.

7. The time periods for which Defendant owes Plaintiff are:

August 25, 1994 – April 1, 1995
April 1, 1995 – March 1, 1996

8. For the time period of August 25, 1994, to April 1, 1995, ("94/95") Colbert owes $54,568.00 for premiums; Colbert has made partial payment of $21,360.00. Colbert

owes OESG $33,208.00 for unpaid premiums. SEE EXHIBIT "B," paragraph 8.

9. For the time period of April 1, 1995, to March 1, 1996, ("95/96") Colbert owes $93,907.00 for premiums; Colbert has made partial payment of $54,646.00. Colbert owes OESG $39,261.00 for unpaid premiums. SEE EXHIBIT "B," paragraph 9.

10. OESG applied a $14,409.00 deposit made by the Defendant toward the debt, leaving a total amount owed of $58,060.00. SEE EXHIBIT "B," paragraph 11.

As to these facts, there is no substantial controversy and Plaintiff is entitled to judgment as a matter of law.

BRIEF AND ARGUMENT IN SUPPORT

Rule 13 of the Rules for the District Courts of Oklahoma, 12 O.S.A. Chp. 2, allows the trial court to render a summary judgment if it appears there is no material controversy as to the facts of the case. There are no facts in this case tending to show that there is a genuine issue for trial regarding the subject transaction. Therefore, summary judgment is proper. *See, Weeks vs. Wedgewood Village, Inc.*, 544 P2d 780 Okla. 1976, and *First National Bank and Trust vs. Kissee*, 859 P2d 502 Okla. 1993. In this case there is no dispute about the following:

1. Defendant signed an agreement asking for workers compensation insurance.
2. Defendant received workers compensation insurance for the periods in question.
3. Plaintiff made partial payments toward the premiums owed.

4. Pursuant to Defendant's request, audits were conducted using Defendant's books and records to determine the total premium owed.

5. The audits determine total payroll which is used to determine the total premium owed.

6. Defendant signed the audits agreeing that they were correct.

7. Based upon the audits, Defendant owes $58,060.00.

8. Pursuant to the contract sued on herein, specifically par. 3, The Defendant is obligated to pay all premiums within 30 days of the date the sum shall become due.

9. Defendant has not paid the total premium owed.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against the Defendant Colbert Nursing Home, Inc., d/b/a Southern Pointe Living Center in the amount of $58,060.00 plus pre-judgment interest, a reasonable attorney's fee and all costs of this action.

Respectfully submitted,

/s/ Mark J. Pardos
EAGLETON & NICHOLSON, P.C.
Don R. Nicholson II, OBA #6673
Mark J. Pordos, OBA #11476
Kent A. Nicholson, OBA #16706
201 Robert S. Kerr, Ste. 310
Oklahoma City, Oklahoma 73120
(405) 236-0550
Attorney for Plaintiff

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A., Plaintiff,	)	
vs.	)	Case No. CJ-96-5268
COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation, Defendant and Third-Party Plaintiff,	)	
vs.	)	
DAVID DANK, Third-Party Defendant.	)	

OKLAHOMA EMPLOYERS SAFETY GROUP'S RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO COLBERT NURSING HOME, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OKLAHOMA EMPLOYERS SAFETY GROUP

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") for its Response to Defendant, Colbert Nursing Home, Inc.'s Motion For Summary Judgment and Reply to Colbert Nursing Home, Inc.'s Response In Opposition To Motion For Summary Judgment of OESG.

COLBERT HAS RAISED NO DISPUTE OF ANY MATERIAL FACTS

Colbert admits that it was a member of OESG. See Colbert's objection to OESG's Motion For Summary Judgment "OESG fact 1, pg 4 attached as Exhibit "A". Colbert admits that it received workmen's compensation insurance coverage. Exhibit "A" "OESG fact 2", pg. 5. Colbert admits that it agreed to pay all premiums relating to its membership in OESG. Exhibit "A" "OESG fact 3", pg. 5. Colbert admits that it requested an audit. Exhibit "A" "OESG fact 4", pg. 5. OESG's fact 5 states that an audit was performed using Colbert's payroll for the applicable period and that Colbert agreed with the correctness of the audit. Facts 6 through 10 states the amount charged, the amount received and the amount owed. Colbert raises no dispute as to any of these facts. *Instead Colbert says that it doesn't know if there are fact issues because these facts are subject to the discovery which has been served upon OESG by Colbert.* This is not true. Only four of Colbert's Interrogatories to OESG (numbers 1, 2, 7 and 10) addressed the correctness of the calculation of the premiums owed. All of these were fully responded to prior to Colbert filing its Motion To Compel. See Exhibit "B". In fact, Colbert's Motion To Compel does not address any of these Interrogatories. See Exhibit "C". In short, Colbert has not provided to this Court any admissible evidence which disputes the material facts stated by OESG. OESG has provided admissible evidence. Colbert has not specifically controverted this evidence with its own admissible evidence. Therefore, OESG's facts are deemed admitted. *Rule 13, Rules of The District Court.*

COLBERT SHOULD PAY FOR SERVICES PROVIDED

Colbert has raised one legal issue which attacks OESG's ability to collect the premiums owed *under the contract* between the parties. Colbert asserts that the contract is void or unenforceable because it violates the securities laws. In support of this argument Colbert asks this Court to take judicial notice of the case styled *Self-Insurers Managements Group v. 99A Training Center, Inc., Et Al,* Case No. CJ-89-9984 in the District Court of Oklahoma County ("Self-Insurers"), wherein this court found a contract for workers compensation insurance unenforceable due to violations of the state securities laws. Though the Plaintiff respectfully submits that each case must be determined on its own merit, rather than based upon the findings made in another case, the differences between this case and the Self-Insurers case illuminates the flaws in the defenses asserted by the Defendants. The Self-Insurers case involves an assessment. An assessment occurs when the association does not bring in enough money from all the members to pay all the members workers claims. The individual members are charged, usually in a pro-rata method, with the responsibility of making up the aggregate short coming. The only basis to hold a member responsible for assessment is the "joint and several" provision in the application for membership (contract) that they sign. Thus, no contract, no assessment. However, the case at bar involves only a premium owed and as such the Self-Insurers case is irrelevant. Because the existence of or validity of a contract between OESG and Colbert is irrelevant.

This case involves the collection of monies owed for a service provided. A valid contract is absolutely unnecessary in order for OESG to recover for the value of the service it provided to the Defendant, Colbert Nursing Home, Inc., OESG is entitled to recover the value of the services provided to Colbert even if the application for membership/contract is unenforceable.

> "When a person has performed services for another, even though it is under an invalid or unenforceable contract, he may recover for those services upon quantum meruit, on the basis of an implied promise to pay the reasonable value for the services. Thus, where one furnishes labor to another under a contract which. . . . is void and of no effect he may recover the value of his services on a quantum meruit as a benefit to the persons receiving them."

66 Am. Jur.2d §61. This concept is well entrenched in Oklahoma law regarding unenforceable written contracts. *Morris Plan Co. v. Campbell,* 67 P.2d 52 (Okla. 1937). *Macsas v. Fishencord,* 124 P.2d 388 (Okla. 1942). *Gutowsky v. Jones,* 178 F.2d 60 (10th Cir. 1949). *Bumcrots v. Alberti,* 132 F.2d 757 (10th Cir. 1943). *Hall v. Haer,* 16 P.2d 83 (Okla. 1932). Thus, OESG is entitled to recover for the insurance provided regardless of the determination of the validity of the contract.

OESG IS NOT SUBJECT TO THE PROVISIONS OF THE OKLAHOMA SECURITIES ACT

Colbert's proposition no. 1 states that the contract to provided workers compensation insurance between

OESG & Colbert gives rise to an interest in OESG that is a security under both the Oklahoma Security Act and the Federal Securities Act of 1933. However, whether the contract is a security or not is irrelevant because OESG is not subject to the Oklahoma securities laws or the Federal securities laws.[1]

Colbert cites and quotes the statute that dooms their argument concerning the Oklahoma Securities Act. Okla. Stat. tit. 85 (1991) §149.1 (c) states as follows:

> "A group self insurer created pursuant to this section *either prior to or after* the effective date of this act *shall not be subject* to the provisions of the Oklahoma Securities Act." (emphasis added).

This statute unequivocally excludes group self insurers, such as OESG, from the provisions of the Oklahoma Securities Act. This statute expressly states that it is to apply to group self insurers formed both *prior to* and after the effective date of the act. Therefore, Colbert's primary argument is overruled by the Oklahoma Legislature.

OESG IS NOT SUBJECT TO THE PROVISIONS OF THE FEDERAL SECURITIES

Colbert also alleges that OESG is a subject to the Federal Securities Act of 1933. Like the Oklahoma Act,

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[1] The definition of security does not include insurance. Okla. Stat. Ann. tit. 71 §2(T). A full discussion of the insurance exemption can be found *infra*, in connection with discussion of Federal securities laws. For Oklahoma case law see *Young v. Stephenson*, 82 Okl 239 (Okla. 1921).

this act has no applicability to OESG. OESG is in the business of providing insurance and is thus excluded from the Federal Securities Law by the McCarran-Ferguson Act. The McCarran-Ferguson Act states as follows:

> "No act of congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the *business of insurance* . . . " (emphasis added) 15 U.S.C. §1012(b).

Where the ultimate purpose of the agreement between the parties is to provide insurance the agreement between the parties constitutes "the business of insurance" within the meaning of the McCarran-Ferguson Act. *Am. Mut. Reinsurance v. Calvert Fire Insurance Co.*, 367 N.E.2d 104, 109 (Ill. Po. App. 1977). There is no dispute, nor can there be any dispute that the ultimate purpose of the agreement (attached as Exhibit "D") was to provide workers compensation insurance to Colbert.[2] Further, all OESG does is provided workers compensation insurance and OESG is in no business other than to provide workers compensation insurance for its members.

The underlying reasons for the exemption from Federal Securities Laws provided by the McCarran-Ferguson Act is that state legislation regulates the conduct in question.

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[2] In the fourth Whereas paragraph of Exhibit "D, pg. 3" it states that the member i.e. Colbert and OESG have elected to establish a group self insurance association pursuant to the provisions of the Oklahoma Workers Compensation Act.

> "The McCarran-Ferguson Act renders Federal Securities Laws inapplicable when state legislation generally proscribes, permits or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision."

Am. Mut. Reinsurance, Supra at 109; See also *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 78 F.Ct. 1260 (1958).[3] Oklahoma has legislated the formation of self insurance associations and a scheme for regulating the same. *Rules of Workers Compensation Court Rule 3 & 1 & 2.* Attached hereto as Exhibit "E". Thus, using the Federal Securities Law to impair the operation of self insurance associations violates the McCarran-Ferguson Act.

Moreover, OESG is also exempt from the Federal Securities Act under 15 U.S.C. 11C(a)(8) which exempts any insurance policy issued by a company subject to the supervision of a state agency. The fundamental characteristic of a policy of insurance is spreading and underwriting of the risk; the risk to be insured against is shifted or distributed. *American Deposit Corp. v. Schacht*, 877 F.Supp. 1066 (N.D. Ill. 1995). Again, it is not disputed, nor can it be disputed, that the purpose of the agreement (Exhibit "D" between OESG and Colbert) is the spreading

---

[3] The conduct in question complained of by Colbert revolves around failure to allegedly disclose certain information. However, as seen in Exhibit "E, pg 4" the Worker's Compensation Court requires extensive disclosure by self insurance associations, which include all the relevant disclosures required in the Federal Securities Act of 1933.

and underwriting of the risk regarding workers compensation insurance claims, etc. *The very nature of self-insurance associations is such that if Colbert or any other members claims greatly exceed its premiums, the excess would be absorbed by the association thus spreading the risk among the members.* Therefore, OESG is exempt from the Federal Securities Act by virtue of the insurance exemptions located at 15 U.S.C. 77C(A)(8).

* * *

CONCLUSION

Colbert admits that they received workmen's compensation insurance coverage and there is no dispute as the amount owed for the workmen's compensation insurance coverage. OESG is not subject to the Oklahoma or Federal Securities Act and did not breach the contract between the parties. And, even if Colbert was able to obtain a ruling from this Court of a void contract though its clearly inapplicable securities argument, OESG would still be entitled to recover the money owned by Colbert for the services provided by OESG to Colbert.

Respectfully submitted,

/s/ Kent J. Nicholson
EAGLETON & NICHOLSON, P.C.
Don R. Nicholson II, OBA #6673
Mark J. Pordos, OBA #11476
Kent A. Nicholson, OBA #16706
201 Robert S. Kerr, Ste. 310
Oklahoma City, Oklahoma 73102
(405) 236-0550
Attorney for Plaintiff

APPLICATION AND CONTR T FOR MEMBERSHIP
OKLAHOMA EMPLOYERS SAFETY GROUP 3087400
SELF INSURANCE ASSOCIATION

NCCI NO. 354028506
Requested Coverage Date 6-25-04

1. Colbert Nursing Home, Inc. dba Southern Pointe Living Center
NAME OF MEMBER AS IT APPEARS ON TAX RETURN (If d/b/a or additional names are used, attach separate sheet)

2. Mailing Address: P.O. Box 47 · Colbert, OK 74733

3. Telephone Number: 405-296-4500 4. Fax Number: 405-296-4502

5. Payroll Office Address: P.O. Box 939 - Antlers, OK ~~74733~~ 74523

6. Principal Location: 101 Sherrard - Colbert, OK 74733

7. How many locations within Oklahoma? 1 8. List all other locations on separate sheet and attach.

9. Completely describe business and operations. If needed, attach separate sheet.
Nursing Home

10. Years under current management/ownership: 6 11. Federal Employer I.D. No. 731-310456

12. Type of Business: ☐ Individual ☐ Partnership ☒ Corporation ☐ Other (Explain) 13. Years in Business: 6

14. Advise any name change, consolidation, merger or other ownership change during the last three years.
none

15. No. of Employees: 60 Do you lease employees *to* another business? ☐ Yes ☒ No Do you lease employees *from* another business? ☐ Yes ☒ No If yes, attach a completed supplemental application.

16. Names of officers, owners or partners and addresses: (If more space is needed, please list and attach.)

(Last)	(First)	(Middle)	Address	Social Security #	Title	Percentage of Ownership	Include for Coverage
Mitchell	Bob		Sq 14 Sec		Pres	22 1/2 %	X
Mitchell	Deloris		"			22 1/2 %	☐ Yes ☒ No
Green	Gilbert		"		V-Pres	22 1/2 %	X
Green	Philip		"		Sec - Treas.	22 1/2 %	☐ Yes ☒ No
Chappell	Kathy		Antlers			10	☐ Yes ☒ No

17. Has the corporate officers payroll been included in determining the estimated annual premium? ☐ Yes ☒ No
Payroll to be included must be part of the Rating Information Section.

18. If you engage owner/operators of truck rigs, do you intend to include them in coverage? ☐ Yes ☐ No ☒ N/A If yes, please list all owner/operators on a separate sheet and attach.

19. Has any workers' compensation insurance policy ever been canceled for any reason? ☒ Yes ☐ No If yes, explain on separate sheet and attach. Currently being canceled for loss ratio

20. Is the premium financed? ☐ Yes ☒ No If yes, attach signed copy of finance agreement with premium payment.

21. Do you have a safety program in operation? ☒ Yes ☐ No Please list details on separate sheet if applicable.

22. Do employees travel out of state? ☐ Yes ☒ No 23. Are pre-employment physicals required? ☒ Yes ☐ No

24. Do you provide health insurance for your employees? ☐ Yes ☒ No

25. Do you own and/or operate aircraft? ☐ Yes ☒ No

EXHIBIT "D"

App. 13

BEST AVAILABLE COPY

PRIOR EXPERIENCE

ATTACH A 3 . . . R LOSS RUN FROM PRIOR CARRIER(S) GIVING LOSS DETAILS AN. PAYMENTS

YEAR	INSURER	ANNUAL PREMIUM
93-94	Security Self Ins. Assoc.	~~$1,277~~
92-93	" " " "	93,918
91-92	" " " "	95,000

$92,328 per LW OK.

WARNING!

AS REQUIRED BY LAW, YOUR ARE HEREBY NOTIFIED THAT ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY INSURER, MAKES ANY CLAIM FOR THE PROCEEDS OF AN INSURANCE POLICY (I.E. AGREEMENT OF COVERAGE) CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION *IS GUILTY OF A FELONY.*

CONTACT INFORMATION

PERSON TO CONTACT RE: SAFETY/LOSS CONTROL:	PERSON TO CONTACT RE: ACCOUNTING/PAYROLL RECORDS
Kathy Chappell 405-298-5151 Lori Hannah 405-216-4500	Kathy Chappell 405-298-5151

RATING INFORMATION

LOCATION	CLASS CODE	CATEGORIES, DUTIES AND CLASSIFICATIONS OF EMPLOYEES	NO. OF EMPLOYEES	EST. ANNUAL PAYROLL
	8810	Clerical	3	38,000
	8829	Nursing Home Employees	57	300,000

AMOUNT REQUESTED FOR INCREASED EMPLOYER'S LIABILITY: $ 500,000

OPTIONAL MEDICAL BENEFITS DEDUCTIBLE INFORMATION

Pursuant to Oklahoma Statute 85 §64, every agreement of coverage issued by the Oklahoma Employers Safety Group Self Insurance Association may include a deductible amount for medical benefits. Any deductible chosen will affect the premium paid by the member. In regard to these deductibles, the Association shall pay the entire cost of all medical deductibles and then require reimbursement from the member for the deductible amount. If the member does not reimburse the deductible amount directly to the Association within sixty (60) days of a written demand for payment, the member shall be liable for the full amount of any such claim for medical care and treatment. No portion of any deductible amount shall be charged or passed on to an injured worker. Please check below the deductible program(s) you wish to have quoted.

☐ NONE ☒ $500.00

A copy of the latest audited financial statement, the balance sheet from the latest Federal Tax Return or a balance sheet prepared on a GAAP basis which has been signed and dated by an owner, partner or officer must be submitted. COVERAGE CANNOT BE BOUND WITHOUT 25% PREMIUM DEPOSIT PAYMENT, A NOTARIZED NOTICE OF JOINT AND SEVERAL LIABILITY SIGNED BY AN OWNER, PARTNER OR OFFICER, FINANCIAL STATEMENT, LOSS HISTORY AND ALL OTHER REQUESTED INFORMATION.

INDEMNITY AGREEMENT AND POWER OF ATTORNEY
(PLEASE READ CAREFULLY)

This Application and Agreement are made by and between each and every member of the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION ("ASSOCIATION"), and by and with the ASSOCIATION itself, based upon the following understandings by the parties.

WHEREAS, the Members have organized and formed an ASSOCIATION which shall be known as the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION, and;

WHEREAS, the ASSOCIATION, on behalf of its Members, will submit to the Oklahoma Workers' Compensation Court, ("Court"), an application to permit the Members to enter into an agreement to pool their respective liabilities under the Oklahoma Workers' Compensation Act, referred to as ("ACT"), and;

WHEREAS, the Rules of the Court require that each and every Member of the Group self insurance association shall execute an Indemnity Agreement and Power of Attorney, and;

WHEREAS, each Member of the ASSOCIATION has elected to become a party to this Agreement, to comply with conditions set forth herein and to establish a group self insurance association pursuant to the provisions of the ACT and the Rules of the Court, and to execute such instruments and take such action as may be required to form and continue such ASSOCIATION.

NOW, THEREFORE, and in consideration of the mutual covenants, promises and obligations contained in this Agreement, which are given by the ASSOCIATION and by each and every Member to each other Member and are so accepted by each and every Member and the ASSOCIATION, the parties hereto covenant and agree as follows:

1. ASSOCIATION, through its MEMBER SUPERVISORY BOARD, ("BOARD"), shall collect all premiums and assessments owed by Member when same is due, or the ASSOCIATION shall promptly terminate the membership of any delinquent Member as provided by Court Rules and shall take all reasonable and necessary actions to collect such delinquent accounts from any terminated Member. The Member will neither ask for or receive credit from the BOARD for payment of premium

2. ASSOCIATION shall acquire excess insurance in amounts required by the Court for the protection of its Members against catastrophic loss.

3. Member *JOINTLY AND SEVERALLY* argues to assume, pay, and discharge any liability under the ACT of any and all Members of the ASSOCIATION, and Member agrees to pay any premiums and assessments as may be required by the BOARD for liabilities and obligations that may incur under the ACT during the term of the Member's participation in the ASSOCIATION. The member is obligated to pay all premiums and lawful assessments within thirty (30) days of the date the same shall become due.

4. Member agrees to cooperate in any way with the Association in regard to periodic audits and inspections to be performed by the Association during the term of this Agreement.

5. In the event any premium or lawful assessment is not paid and collection process becomes required by the Association, the member agrees to pay the cost of collection thereof including a reasonable attorney fee of the amount sought to be recovered plus ten percent (10%) interest on all unpaid amounts. In the event litigation becomes necessary in regard to collection or any other dispute that may arise as a result of this Agreement, the parties stipulate that Oklahoma County, Oklahoma will be the proper venue for the legal action. The parties further stipulate that if supplemental proceedings are required subsequent to judgment, the president and secretary of a corporate member or all partners of a partnership member or the individual in the event of an individual member shall submit to the supplemental proceedings in Oklahoma County, Oklahoma.

6. Member agrees to notify the ASSOCIATION immediately upon entering into any leasing contract for its employees. The ASSOCIATION shall *not* be liable for any sums that the Member must pay as a result of a claim for wrongful discharge that may be brought against said Member pursuant to Sections 5, 6 and 7 of the ACT and the ASSOCIATION shall not investigate said claims nor provide any defense to said Member for same.

7. Member is to report to the Association immediately any changes in the business structure of the member or addresses thereof or additional locations obtained.

8. Member is obligated to promptly report all workers' compensation claims arising during the term of his/her membership to the Association on the prescribed forms.

9. Member shall establish safety guidelines for his/her firm in order to give his/her employees the maximum in safe and sanitary working conditions.

10. Association will defend, in the name and on behalf of the member, any suits or other proceedings which may at any time be instituted against the member on account of injuries or death within the purview of the Oklahoma Workers' Compensation Law. Liability of the self-insurance association to the employees of any employer is specifically limited to such obligations as are imposed by the Oklahoma Workers' Compensation Law.

11. Member grants David M. Dank, as administrator, the power of attorney to act for and to bind the members in all transactions relating to or arising out of the operations of the Oklahoma Employers Safety Group Self Insurance Association, including but not limited to authorizing the administrator to accept service of process for the Association and to file with and make requests for information from the National Council on Compensation Insurance. The administrator shall determine all sums due the fund from the members, pay all approved items of expense as directed by the Board and give the Board an annual accounting of all monies so

handled. The Administrator shall carry out the lawful policy established by the Board for the successful operation of the self insurance association in accordance with the provisions of the Administrator's Contract. The Board retains the right of substitution of the Administrator and the right of revocation of the power of attorney granted to the administrator in accordance with the provisions of the Administrator's Contract filed with the Court.

12. Regardless of whether the Member terminates its membership in the ASSOCIATION voluntarily, or whether such membership is terminated by the ASSOCIATION or the Court, this Agreement, the *JOINT AND SEVERAL OBLIGATION* and the power of attorney shall continue in force and effect and shall remain completely unabated concerning any and all liabilities and obligations that the ASSOCIATION or its Members may incur under the ACT or by actions of the Board during the term of the Member's participation in the ASSOCIATION.

13. Member intends this Agreement as a mutual covenant of assumption and not as a partnership, but if any court of competent jurisdiction shall construe it to be a partnership, then it is the intent of the parties that such partnership be limited in scope to the uses for which this Agreement is executed and for no other.

14. Member *JOINTLY AND SEVERALLY* covenants and agrees that there shall be no disbursements out of funds of the ASSOCIATION by the way of dividends or distribution of claim reserves until provision has been made for all obligations of the ASSOCIATION under the ACT and, except at the discretion of the

BOARD, upon application and approval by the Court.

15. Member may terminate its membership in this ASSOCIATION by giving ten (10) days written notice by certified mail, return receipt requested to the ASSOCIATION and to the Court. Termination of a Member's membership by the ASSOCIATION or by withdrawal of approval by the Court shall be upon ten (10) days written notice by certified mail, return receipt requested to the Member and the Court.

16. Member consents to allow ASSOCIATION to obtain a consumer report from a consumer reporting agency.

SIGNATURE OF MEMBER/APPLICANT

Kathy Chappell	Owner	8-23-94
Official/Representative of Member (Print Name)	Title	Date

/s/ Kathy Chappell
Signature

CONTINUING GUARANTY

The undersigned JOINTLY AND SEVERALLY, PERSONALLY AND UNCONDITIONALLY GUARANTEE payment of any amounts not paid when due by the insured under the foregoing Membership Agreement. The liability of the undersigned shall not be affected by the discharge or release of the indebtedness, liability or obligation of the insured. In the event any amount is not paid under this Guarantee, the undersigned agree to pay all costs of collection, including a reasonable attorney fee

and ten (10) percent interest on the unpaid balance. Further, the undersigned agree that Oklahoma County, Oklahoma will be the proper venue for any such legal action and agree to submit to proceedings supplemental to judgment in Oklahoma County, Oklahoma.

Guarantor, Personally — Date

Guarantor, Personally — Date

Witness — Date

PRODUCER INFORMATION

LARRY JONES — Producer

PROPERTY INSURORS — Agency

3817 NW EXPRESSWAY, STE 1030, OKC OK 73112 — Address

942-7117 — Telephone

949-1149 — Fax

Received and Accepted by the MEMBER SUPERVISORY BOARD and the FUND ADMINISTRATOR of the OKLAHOMA EMPLOYERS SAFETY GROUP SELF INSURANCE ASSOCIATION.

Chairman — Date

Illegible — Fund Administrator

9/23/94 — Date

EXHIBIT "E"

RULES OF THE ADMINISTRATOR OF THE WORKERS' COMPENSATION COURT

RULE 1.

DETERMINATION OF MEDICAL COSTS

A good faith effort shall be made by the self-insured employer or insurance carrier to pay all charges, or the portion of all charges which are in compliance with the Schedule of Medical Fees. All medical charges which are in compliance with the Schedule of Medical Fees should be paid within thirty (30) days after such charges are submitted to the self-insured employer or insurance carrier. If such good faith payment is not made within sixty (60) days of the charges being submitted, and the issue of compensability of the injury, necessity of treatment, or other issues requiring a judicial determination are not raised before a Judge of the Workers' Compensation Court, the Schedule of Medical Fees will become applicable only if ordered by a Judge of the Workers' Compensation Court.

Charges disputed due to conflicting interpretation of the Schedule of Medical Fees may be submitted to the Administrator by the medical provider to determine the proper amount due in accordance with the Schedule of Medical Fees.

A request for Administrative Review of disputed medical charges may be made by filing a Form 18, REQUEST FOR ADMINISTRATIVE REVIEW OF DISPUTED MEDICAL

CHARGES. A copy of the Form 18 and all supplemental materials shall be sent by the medical provider to the self-insured employer or the insurance carrier. A copy of the actual medical bill in dispute must include dates of service, procedure codes, charges for services rendered and any payment received, and an explanation of unusual services or circumstances.

When a Form 18 is received by the Administrator and it is determined that the Workers' Compensation Court lacks jurisdiction in the matter, a Submission Form shall be forwarded to the self-insured employer or insurance carrier to be signed and returned by their authorized legal representative before the Form 18 will be reviewed.

When the Form 18 is received by the Administrator and it is determined that the Workers' Compensation Court has jurisdiction over the cause of action, all parties will be notified by mail. All parties shall have thirty (30) days from the date of notification to submit further evidence, documentation, or clarifications to the Administrator. After thirty (30) days, a decision will be determined by the Administrator and an order will be issued. Prior to this determination, the Administrator may request all parties to attend a hearing on the matter.

Any party feeling aggrieved by the order of the Administrator shall have ten (10) days to appeal the ruling to a Judge of the Workers' Compensation Court. A decision must be entered by the Administrator before any appeal may be brought.

Adopted effective April 30, 1989

RULE 2.

OWN RISK EMPLOYERS

Any employer subject to the Workers' Compensation Act, who has not otherwise secured compensation insurance for its employees, shall file with the Insurance Department of the Court, a completed Form 1-B, Employer's Application for Permission to Carry Its Own Risk Without Insurance. This application shall be submitted to the Court at least sixty (60) days prior to the desired effective date, or renewal date for existing permits. The application shall include complete answers to all questions contained therein and shall include satisfactory proof as to the employer's ability to pay an award made by the Court. All attachments listed on the Form 1-B must be submitted with the application.

With the exception of governmental entities, an employer desiring to self-insure must meet all the following qualifications and guidelines:

(1) Have been continuously engaged in business for a period of not less than five (5) years;

(2) Have had an average minimum payroll of not less than one million dollars ($1,000,000.00) in each of the preceding three (3) years;

(3) Have a shareholders' equity of not less than five hundred thousand dollars ($500,000.00); and

(4) Employ not less than one hundred (100) employees.

Applications must attach a financial statement (preferably audited), including a balance sheet and income statement. If the company's current fiscal year-end financial report is not available at the time of application, it should be submitted to the Court promptly. The application must also include a current proof of reinsurance (binder or certificate).

Any subdivision or subsidiary of any employer must provide a written guarantee from its parent company which states the parent company will be fully responsible for any liabilities that its subdivision or subsidiary may incur under the Workers' Compensation Act.

A self-insured company may be required to post a surety bond, letter of credit or initiate a reserve self-funding program. If posting a surety bond or letter of credit, the amount required will be determined by the Court Administrator. If the self-insured company self-funds their reserves, the following guidelines will apply:

(1) An initial fund amount, determined by the Court Administrator, will be deposited into a separate Workers' Compensation Claims Fund. This base amount will remain constant;

(2) The self-insured company will deposit, into this account, the amount of each claim reserved;

(3) Claims will be paid from this account. Once the claim is closed, excess money reserved may be returned to the self-insured company;

(4) All interest earned from this account may be retained by the company; and

(5) The Court reserves the right to order a third party Administrator to oversee this reserve fund.

An employer must obtain a policy of re-insurance from an approved or licensed carrier. Specific excess insurance is required by the Court. Aggregate excess coverage may be required. The reinsurance agreement shall contain a minimum of thirty (30) days written notice to the Court of cancellation. An insurance certificate or binder must accompany the application. A copy of the policy should be submitted to the Court promptly.

Any employer may be exempt by the Court from any of the above qualifications upon showing that the employer is otherwise financially able to pay any award made by this Court and the employer is in compliance with the statutes and Court Rules at the time the application is made.

Claims should be handled by a Court approved claims servicing company or by a Court approved benefits administrator within the self-insured company. If the self-insured employer employs a benefit Administrator for claims handling, the experience and qualifications of this person must be submitted at the time of the application. Court approval of the Self-Insurance Permit will also allow the benefits Administrator to service daims. An audit of the reserves may be required by the Court at any time.

A self-insured employer may not collect a premium from an employee for workers' compensation.

A governmental entity may make application to carry its own risk without insurance provided it furnishes the

Court with reasonably detailed information relative to its financial status, including a definite statement of the amount it has specifically appropriated for workers' compensation claims. Proof of reinsurance or other information regarding the governmental entity's ability to fund its obligation under the Workers' Compensation Act may be required.

Failure to comply with any provision of the Workers' Compensation Act or any of these rules shall be grounds for revocation of the own-risk permit.

The Court Administrator may, at anytime, call a Show Cause Hearing for any self-insured employer. The Court shall give ten (10) days prior notice of such hearing.

Any motion to revoke a Self-Insurance Permit shall be filed with the Court Administrator. The Administrator shall conduct an investigation and if necessary, a hearing on the revocation of said permit. Any order revoking a Self-Insurance Permit may be appealed to a three judge panel of the Workers' Compensation Court.

Adopted effective September 1, 1989.

RULE 3.

GROUP SELF-INSURANCE ASSOCIATIONS

This rule relates to a regulatory function of the Workers' Compensation Court and not to a judicial function. Approval by the Supreme Court of the State of Oklahoma would be inappropriate (See "Order of the Supreme Court", September 28, 1981).

Section 1: Authority

This regulation is promulgated and adopted pursuant to and in accordance with the provisions of 85 O.S. Section 1.2(E) and 85 O.S. Section 149.1.

Section 2: Purpose

The purpose of this regulation is to set forth rules, forms and procedural requirements which the Court deems necessary to carry out the provisions of 85 O.S. Section 149.1.

Section 3: Definitions

(a) "Court" means the Workers' Compensation Court of the State of Oklahoma.

(b) "Group Self-Insurance Association" or "Association" means an association organized by two or more employers having a common interest which have entered into agreements to pool their liabilities under the Oklahoma Workers' Compensation Act.

(c) "Employer" shall have the definition provided by 85 O.S. Section 3(3).

(d) "Common Interest" means employers engaged in the same or similar types of business or who otherwise have a recognizable common purpose for associating. If an application of an association is approved by the Court, different businesses which are owned or controlled by a member of the association are also eligible for membership in such association. For purpose of this regulation control shall be a "majority interest" as defined by the

Experience Rating Plan approved by the State Board for Property and Casualty Rates.

(e) "Certified Audit" means an audit upon which the auditor expresses his professional opinion as to whether or not the accompanying statements fairly present the financial position of the group self-insurance association and whether or not such statements are in conformity with generally accepted accounting principles consistently applied, including tests of the accounting records and other such auditing procedures that are considered necessary in the circumstances.

(f) "Gross Premium" means the annual premium for each employer developed by using rates and classifications approved by the State Board for Property and Casualty Rates.

(g) "Standard Premium" means the gross premium adjusted by experience modification factors developed in accordance with an Experience Rating Plan approved by the State Board for Property and Casualty Rates.

(h) "Normal Premium" means the standard premium less any allowable discount pursuant to Section 11 hereof.

(i) "Member" means an employer party to an indemnity agreement for membership in a group self-insurance association.

(j) "Act" means the Oklahoma Workers Compensation Act as provided by Title 85 of the Oklahoma Statutes.

(k) "Administrator" means the individual, partnership, or corporation designated and authorize as the representative of the members in the pooling of their liabilities under the Act and matters incidental thereto.

(l) "Indemnity Agreement and Power of Attorney" means the written agreement executed by each member of the association through which each member:

i. agrees to assume and discharge, jointly and severally, and liability under the Act of any and all members party to such agreement; and,

ii. grant the administrator power of attorney to act for and to bind the members in all transactions relating to or arising out of the operations of the association.

(m) "Member Supervisory Board", or "Board", means the representative body selected by the members which is to be responsible:

i. for holding and managing the assets;

ii. for directing the affairs of the association; and,

iii. for assuring that the association, through its members, is financially sound and able to meet its obligations under the Act.

Section 4: Application for Approval as a Group Self-Insurance Association: Requirements, Approval, and Review

Two or more employers having a common interest, as defined in Section 3, may be approved by the Court as a group self-insurance association for the purpose of entering into agreements to pool their liabilities under the Act. Such application shall be made in a form acceptable to the Court and shall be verified by the oath of at least two members of the members' advisory board of the association or the administrator.

If after review of the association's application, as well as the additional information as required by Section 5 hereof, the Court may approve the association's application if it has satisfactory proof of:

(a) the solvency of each member of the association;

(b) the financial ability of each employer to meet its obligations as a member; and,

(c) the ability of the association to pay or cause to be paid the compensation in the amount and manner and when due as provided for in the Act.

Any application so approved shall be subject to all conditions and requirements set forth in these rules and regulations. In order to determine continued compliance with the law and these regulations, such application shall be reviewed on an annual basis or whenever deemed necessary by the Court Administrator.

Section 5: Application for Approval as Group Self-Insurance Association: Additional Requirements.

The group self-insurance association's application should be submitted thirty (30) days prior to the effective date and shall be accompanied by all of the following:

(a) A copy of the members' indemnity agreement and power of attorney, as required by Section 12 hereof binding the association and each member thereof, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association;

(b) An executed copy of the application of each employer for membership in the association on the approved association's application effective date;

(c) A pro forma financial statement of the association, in accordance with the financial reporting requirements in Section 8 of this regulation. Such financial statements, or other verified information, shall indicate that the membership of the proposed association has a combined net worth of at least two million dollars ($2,000,000.00);

(d) A composite listing of the estimated annual gross premium to be developed by each member of the association individually. The aggregate shall contain a start-up premium of two hundred fifty thousand dollars ($250,000.00), and not be less than five hundred thousand dollars ($500,000.00) by the end of the first fiscal year, provided any group self-insurance association not formed in conjunction with an established employer trade association operating in the state of Oklahoma for not less than five (5) years must demonstrate a star-up [sic] funding of at least four hundred thousand dollars ($400,000.00), with an annual premium of at least one million dollars ($1,000,000.00);

(e) An insurance binder or certificate of excess insurance issued by an authorized insurer in an amount acceptable to the Court and that complies with the requirements as in Section 9 hereof;

(f) A designation of the initial members' supervisory board and of the administrator of the association, including properly executed biographical affidavits for each. Affidavits are to be submitted in a form acceptable to the Court;

(g) Information which shall satisfy the Court that the association either within its own organization, or by contract with an approved servicing organization, has ample facilities and competent personnel to service its program with respect to underwriting matters, claims adjusting, and industrial safety engineering;

(h) A confirmation of the fidelity bond in a form amount agreeable to the Court;

(i) A copy of the indemnity agreement and power of attorney as required by Section 12 that binds the association and each member thereof, jointly and severally, to comply with the provisions of the Act; and

(j) A projection of administrative expenses in an amount, for the first year of operation, and as a percentage, of the annual standard premium collected, in a form acceptable to the Court.

Section 6: Approval of New Members of the Association

A new membership may not become effective without Court approval. All applications for membership, in a form satisfactory to the Court, shall be filed with the Court. The application shall include evidence of the execution of the indemnity agreement and power of attorney as required by Section 12 hereof, with approval of the applicant by the association, and shall be accompanied by current financial statements satisfying the conditions as described in Section 8 hereof. Upon renewal of the application by any association, a complete list of active members shall be provided, including actual premiums paid

during the past year and projected annualized premiums for the application year.

Section 7: Investment and Reserve Requirements

The members' supervisory board of an association may, in its discretion, invest its funds in either of the following investments:

(a) Savings accounts or certificates of deposit in a FDIC or FSLIC insured institution; or,

(b) Direct obligations of the United States Treasury, either as notes, bonds, or bills that are backed by the full faith and credit of the United States Government.

An association shall maintain unearned premium and loss and claim reserves computed in [sic] manner acceptable to the Court.

Section 8: Filing of Reports

On or before the one hundred twentieth (120) day after the end of its fiscal year, every association shall file with the Court an annual report. Such report shall be submitted in a form acceptable to the Court and shall be verified under oath either by the administrator of the association of by other principal officers or members of the supervisor board.

The annual report shall reflect the association financial condition. The reporting of financial condition required shall consist of a certified audit report prepared by either an Oklahoma independent certified public accountant or

by Big Eight accounting firm. Audits must include complete breakdown of all monies collected by the group, including the amount discounted and complete breakdown of expenses. The audit should footnote and analyze completely all paid claims and claims reserved but not reported. A footnote must also be included to indicate if payments to contracted parties are in accordance with current contracts.

An interim financial statement shall be filed sixty (60) days following the mid-year fiscal anniversary of the association. This statement need not be audited, but should reflect pertinent data regarding income, including the standard premium discounts, interest earned, and expense constant fees, as well as a breakdown of the association expenses.

In addition to financial reports, every association approved by the Court shall file annually a reporting of its members' experience as a group self insurer in a form acceptable to the Court.

The association may be required to submit to the Court an independent audit of the reserves prepared by an acceptable firm or by the association's excess insurance carrier. The Court may order an audit of the reserves at any time.

Section 9: Contracts for Excess Insurance

Specific and aggregate excess insurance or reinsurance may be required as a condition for licensing a group self-insurance association and shall be subject to the following rules and conditions;

(a) A contract or policy of excess liability insurance shall not be recognized by the Court in considering the ability of an applicant to fulfill its financial obligations under this act unless such contract or policy:

1) Is issued by either an insurance company duly licensed by the State Insurance Commission or is otherwise authorized to write such coverage in the State of Oklahoma.

2) Is not cancelable or terminable for any reason except upon thirty (30) days written notice by registered or certified mail to:

i. the other party to the policy, and

ii. the Court.

3) Is automatically renewable at the expiration of the policy period except upon a thirty (30) days written notice by the party not renewing the policy, either by registered or certified mail to:

i. the other party to the policy, and

ii. the Court.

(b) Copies of the complete contract or policies of excess liability insurance, complete with all endorsements thereto, shall be filed with the Court.

(c) The aggregate coverage attachment point should not exceed one hundred percent (100%) of the standard premium, unless specifically authorized by the Court.

(d) Under certain conditions, an irrevocable Letter of Credit may be presented in lieu of aggregate excess insurance. The form and amount of said Letter of Credit must

be approved by the Administrator of the Workers' Compensation Court.

Section 10: Responsibilities of Members' Supervisory Board

The members' supervisory board shall be responsible for holding and managing the assets and directing the affairs of an association and shall be elected in the manner prescribed by the association's governing instruments. All board members must be members of the association. A board member shall not be either an owner, officer, or employee of any entity under contract with the association.

The board shall supervise the finances of the association and the association's operations to such extent as may be necessary to assure conformity with these rules and regulations, the members indemnity agreement and power of attorney, and the association's governing instruments. The members' supervisory board shall take all necessary precautions to safeguard the assets of the association, including (but not limited to) the following:

(a) Monitoring the financial condition of each member of the association, and doing all other acts to the extent necessary to assure that each member continues to be able to fulfill the obligations of membership, promptly reporting to the Court any grounds for believing that either a change in any member's financial condition, withdrawal of a member, or any other circumstances might affect the association's ability to meet its obligations.

(b) Designating an administrator to administer the financial affairs of the association, who shall furnish a fidelity bond with the association as obligee, in an amount sufficient to protect the association against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Court and evidence of such shall be filed with the Court, bond being one of the conditions required for approving the association.

(c) Retaining control of all monies either collected or disbursed by and for the association. All loss funds of any type shall remain in the custody of the board or the authorized administration; however, provided that a revolving fund for payment of compensation benefits due, and other related expenses, loss funds may be established for the use of any authorized service organization and shall furnish a fidelity bond covering its employees, with association as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Should the bond required of the administrator also cover the monies in the revolving fund, separate bond shall not be required of the servicing organization with respect to such revolving fund.

(d) Having the accounts and records of the association audited annually or at any time the Court deems necessary. The Court may prescribe a uniform accounting system to be used by self-insurance associations and/or servicing organizations, and the type of audits to be made in order that it may determine the solvency of the association.

Copies of the audit shall be filed with the Court within one hundred twenty (120) days after the close of the fiscal year. An association's fiscal year may not be changed without prior Court approval.

(e) Active efforts to collect delinquent accounts resulting from any unpaid premiums by members. Any member of an association who fails to pay the required premiums after due notice shall be ineligible for the self-insurance privilege until such past due account, including cost of collection, has been paid.

(f) The members' supervisory board shall hire legal counsel when deemed necessary to represent the membership in workers' compensation litigation. Board members will be responsible for monitoring fees paid to legal counsel.

(g) Neither the members' supervisory board nor the administrator shall utilize any of the monies collected as premiums for anything unrelated to the purposes of the group self-insurance association, to workers' compensation, or to securing the members' liability under the Act. Furthermore, they shall be prohibited from borrowing any monies from the association without advising the Court of the nature and purpose of the loan and obtaining the Court's approval. The board may, at its discretion, invest its funds in accordance with Section 7 hereof.

(h) The members' supervisory board shall assure that the administrator of the association and all records necessary to verify the accuracy and completeness of reports submitted to the Court, are maintained at a central location within the State of Oklahoma.

(i) The members' supervisory board shall assure that payroll audits of all members of the association are conducted in accordance with rules, classifications, and rates approved by the State Board for Property and Casualty Rates, as directed by the National Council for Compensation Insurance (N.C.C.I.)

(j) The association's supervisory board and the Court Administrator should be notified in writing of all disputes regarding proper rate classification codes. The Court may appoint a certified safety professional to review the scope manual to determine the applicable classification code. The expense of the professional service will be applied for by the association.

(k) The members' supervisory board shall notify the Court prior to all board meetings. Copies of the minutes of all board meetings shall be submitted to the Court in a timely manner.

(l) The Court must be notified within ten (10) days of any change in the association's board. Any new board member must submit to the Court a properly executed biographical affidavit.

(m) The board may designate a marketing firm or individuals to market the association's program. The marketer(s) of an association's program(s) must be either licensed agents in the State of Oklahoma, or approved by the Administrator of the Workers' Compensation Court. Marketing firms and all agents must be approved by the Court to market a self-insurance program.

All marketing material must be submitted to the Court prior to being utilized by an association. Each sales interview must include a clear presentation of a proposed members joint and several liability.

Section 11: Premium Deposit, Advance Premium Payments, and Distributions of Surplus Funds

The members' supervisory board of a group self-insurance association shall not allow any advance premium discount to any member in excess of that allowed by the excess insurance underwriter.

On the association's effective date, the premium deposit of at least twenty-five percent (25%) of the first year's normal premium payable by each member of the association, shall have been paid into a designated depository, which shall certify receipt of same to the Court. The balance of the first year's premium shall be paid, either in quarterly or monthly installments at the discretion of the board, no later than the end of the ninth month of that insurance year.

Any surplus monies i.e. those in excess of the amount necessary to fulfill all obligations under the Act, may be declared refundable by the board, and the amount of such declaration shall be a fixed liability of the association at the time of the declaration. The date of payment shall be as declared by the board, and notice thereof shall be given to the Court with such supporting information as the Court may require. Payment of surplus monies shall not be made until approved by the Court.

In the event of a deficit, such deficit shall be made up immediately either by assessment of the membership or by such alternate method as the Court may approve or direct.

Section 12: Indemnity Agreement

Every member of a group self-insurance association shall execute an indemnity agreement and power of attorney which shall set forth the rights, privileges and obligations of the member and the association and the powers and duties of the administrator. Such indemnity agreement and power of attorneys shall be subject to the approval of the Court and shall contain in substance the following provisions:

(a) An agreement, on a form approved by the Court, under which each member agrees to assume and discharge, jointly and severally, liability under the Act of any and all employers party to such agreement.

(b) Provisions requiring that the members' supervisory board designate and appoint an administrator empowered to accept service of process on behalf of the association and authorized to act for and bind the association and members in all transactions either relating to or arising out of the operation of the association.

(c) Provisions for the right of substitution of the administrator and revocation of the power of attorney and right hereunder.

(d) Provisions that clearly state all of the coverages of the policy.

One copy of the indemnity agreement and power of attorney shall remain in the members' possession at the time the application for membership is made. One copy must be filed with the Court.

Section 13: Administration and Servicing of Association

Any individual, partnership, or corporation desiring to engage in the business of servicing an approved workers' compensation group self-insurance association shall make application to the Court prior to entering into a contract with the association, and shall satisfy the Court that it has or will have, at the time it commences operation, adequate facilities and competent personnel to service a group self-insurance program with respect to underwriting matters, claim adjusting, and industrial safety engineering in such a manner as to fulfill the employer's obligation under the Act and the Rules and Regulation of the Court.

The application to the Court for approval to act as a servicing organization, for an association, may take the form of a letter explaining in detail the services that the company will be providing and describing its physical facilities and competency of its personnel to perform such services.

A servicing organization shall maintain a resident agent in the state of Oklahoma and that agent shall be authorized to act for the servicing organization on any and all matters covered by the Act and the Rules and Regulations of the Court.

A servicing organization shall file with the Court copies of all contracts entered into with the association as they relate to the services to be performed. Said contracts shall include those services necessary to fulfill the employer's obligations under the Act and the Rules and Regulations of the Court. In addition, any service contract must state that the servicing organization agrees to handle all claims incurred during the contract period to their conclusion, unless approval to transfer said claims is obtained from the Court prior to such transfer.

Any change in the servicing contract must be filed with the Court ten (10) days prior to the effective date.

Upon compliance with the above provisions of the satisfaction of the Court, a certificate of approval as a recognized and authorized servicing organization will be issued to the applicant.

Each individual, partnership, or corporation approved to act as a servicing organization for an association shall file an annual statement of financial condition with the Court within four (4) months after the close of its fiscal year, such statement having been prepared by an independent certified public accountant in a form acceptable to the Court.

Section 14: Termination of Members of Association

A member of an association may not be terminated unless at least ten (10) days written notice has been given to the member and the Court.

The association shall remain liable for all claims applicable to the period during which an employer was a member of an association, including the ten (10) days period required for termination of membership.

Section 15: Revocation of Approval of Self-Insurance Application

Failure to comply with either any of the foregoing rules or order of the Court within the time prescribed shall be considered good cause for revocation of the approval of an association's application. Noncompliance with any of the provisions of the Act shall likewise be deemed such cause. The Court shall give ten (10) days notice prior to such revocation to the association. Such notice shall be served either personally or by certified or registered mail, upon all interested parties setting forth the grounds therefore and affording the association an opportunity to introduce evidence and be heard. After a hearing, if the approval of the association's application is revoked, the revocation shall become effective thirty (30) days after issuance of the Court's order.

Section 16: Examination of Association

Whenever the Court deems it expedient for the protection of the interests of the people of the state of Oklahoma, it may make or direct to be made an examination into the affairs either of any association, member, marketing firm, or servicing organization approved in the state of Oklahoma.

Section 17: Penalties

Penalty for failure to comply with this regulation shall be as provided in Section 15 hereof.

Section 18: General Operating Guidelines of Association

A. The assets of a self-insurance association and control thereof are property of the self-insurance association members under the direction of its supervisory board members.

B. Any change in the by-laws and/or contracts with the association must be filed promptly with the Court.

C. Any false or misleading solicitation of membership in the group self-insurance association may be cause for cancellation of approval of the servicing organization, marketers, and the group self-insurance association as a whole.

D. Maximum operating expenses of the association should not exceed thirty-three percent (33%) of the standard premium. These expenses include the following:

1) Administrator's fee

2) Claims service fee

3) Marketing fees, billing and collection fees and sales commissions

4) General operations expenses, including audits

5) Cost of excess insurance

6) Any other fees previously approved by the Court.

E. The members discount must be approved by the Court at the time of application and/or renewal. It may not be changed without Court approval.

F. Any recalculation, of premium due to experience modification, cannot be retroactive more than one hundred eighty (180) days.

G. A cancellation short rate penalty fee may not be charged if the member has been a member of the association at least twelve (12) months prior to cancellation.

H. An association soliciting large numbers of another group's membership or utilizing marketing materials not approved by the Court Administrator are grounds for immediate revocation of the approval of the servicing organization, marketers, and the group self-insurance association as a whole.

I. Any trade membership dues must be collected separate from the self-insurance group association. Services provided by the trade association must be fully explained to members joining the trade association.

J. A separate safety program may not be sold to a member by the marketer of the association. A marketer may sell only the association's program to a member or prospective member.

K. At least ninety percent (90%) of all expense constant fees collected shall be deposited directly into the association's general revenues. No portion of these fees may be

paid to any group or individual contracted with the association in an amount greater than that of the normal sales commission allowed.

L. All billing and receiving will be supervised and reviewed by the claims servicing company and the administrator of the association. All monies must be deposited promptly in the self-insurance association's designated Oklahoma depository account.

M. Wrongfully changing employee classification codes or rates are grounds for immediate revocation of the approval of the servicing organization, marketers, and the group self-insurance association as a whole.

N. The association shall annually file all applicable information with the N.C.C.I. for the calculation member modifiers.

O. The Court may, at any time, have a Show Cause Hearing for any group self-insurance association. The Court shall give ten (10) days notice prior to such hearing.

Section 19: Severability

If any provisions of this regulation, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or application of this regulation which can be given effect without the invalid provision or application, and to that end the provisions of the regulation are severable.

Adopted effective January 1, 1990.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA EMPLOYERS SAFETY GROUP, S.I.A.,

Plaintiff,

vs.

COLBERT NURSING HOME, INC., d/b/a Southern Pointe Living Center, an Oklahoma Corporation,

Defendant and Third-Party Plaintiff,

vs.

DAVID DANK,

Third-Party Defendant.

OKLAHOMA EMPLOYERS SAFETY GROUPS SUPPLEMENTAL RESPONSE TO COLBERT NURSING HOME, INC.'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO COLBERT NURSING HOME, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF OKLAHOMA EMPLOYERS SAFETY GROUP

(Filed Jan. 7, 1997)

COMES NOW the Plaintiff, Oklahoma Employers Safety Group, S.I.A. ("OESG") and for its Supplement to Briefs submitted for this Court's review and shows the Court as follows.

OESG did dispute the statements listed by Colbert as undisputed facts. The majority of the undisputed "facts" are questions of law addressed thoroughly in Plaintiff's

Briefs. Moreover, Colbert's allegations of mismanagement, fraud, etc. on the part of OESG completely lacking in any evidencing support.

While OESG has been determined to stay focused on the legal issues involved in this case and not participate in the unnecessary rock throwing which Colbert continues to initiate Plaintiff will quickly respond to these slanderous allegations.

David Dank has done a superb job as Administrator of OESG as a self insurance association. OESG, to this authors knowledge is the only self insurance association that has never required an assessment against its members. It is financially stable and has been operated in accordance with its constitution and By Laws from its inception to date. Every dollar which has been provided to David Dank for his impeccable services to OESG has been fully disclosed within the financial statements submitted to the Workmens' Compensation Court each year since he has been the Administrator. OESG has done more work to improve the safety of the workplace, thus reducing the amount of injuries to employees than any other self insurance association; OESG's focus is on reducing injuries to workers, thus reducing the cost of workmens compensation insurance to its members. David Dank is a respected member of this community and has done a superb job of running this self insurance association. David Dank is guilty of no wrong doing and any allegations to the contrary are ludicrous.

OESG IS NOT SUBJECT TO THE OKLAHOMA OR FEDERAL SECURITIES LAWS

It can hardly be disputed that most any insurance contract fits the definition of a security under both the Federal and Oklahoma Securities Act. Thus, the exemption of insurance contracts in the Federal Act and the exclusion of insurance contracts within the Oklahoma Act. OESG has demonstrated that its Application for Membership ("Contract") is an insurance contract both within the meaning of a federal insurance exemption and the Oklahoma insurance exclusion. In order to determine whether a contract is a contract for insurance or something else the question to be asked is does the agreement spread or distribute risks. *American Deposit Corp v. Schncht*, 887 F.Supp. 1066 (N.Dist. Ill, 1995). The definitions used under Oklahoma law in order to determine whether a contract is that of a contract for insurance or otherwise is virtually the same. Insurance is defined as "a contract whereby one undertakes to indemnify another or to pay a specified amount upon a determinable contingency". Okla. Stat. Ann. tit. 36 §102. "An insurer includes every person engaged in the business of making contracts of insurance or indemnity". Okla. Stat. Ann. tit. 36 §102. The definition of insurance is the same under Oklahoma common law. Insurance is a contract for consideration to pay a sum of money upon happening of a particular occurrence, event or contingency. *Young v. Stevenson*, 38 Okla. 242 (Okla. 1921). The very nature of OESG and other self insurance associations is such that if Colbert or any other members claims greatly exceed its premiums, the excess would absorbed by the association, thus

spreading the risk among the members. Thus the association indemnifies Colbert for the risk associated with workers injuries. The particular event of contingency which is being indemnified is the chance that Colbert's workers will be injured.

Colbert's Response is completely lacking authority. Colbert states that the contract at issue in this case is not insurance because it is not "straight insurance", yet Colbert provides no authority for the assertion that the Oklahoma exclusion or the federal exemption only applies to "straight insurance". Moreover, no authority is provided to inform this Court as to the meaning of "straight insurance". As this Court is aware, insurance comes in all different shapes and sizes. It is a unique facet of intrastate and interstate commerce and thus it has been left to the States to regulate this unique activity of the business of insurance. Colbert's only distinction between OESG's Application for Membership as to other insurance contracts is that Colbert had voting rights. Again, Colbert provides no authority that the existence of voting rights for members of OESG would some how take them out of the definition of insurance provided by the Court's interpreting both the Oklahoma and Federal Act. OESG has provided this Court with the authority regarding the definition of insurance and voting rights are *not* a factor.

OESG demonstrated in its Brief that the Federal Securities Laws cannot apply to OESG by virtue of the McCarran-Ferguson Act. Colbert Does not dispute that Okla. Stat. tit. 85 §149.1 and Rule 3 of the Workers' Compensation Court are state legislation regulating the business of insurance. OESG clearly demonstrated that the application of the Federal Securities Laws to OESG would impair

or impede Oklahoma legislation and regulation of self insurance associations. Thus the Federal Securities Laws cannot be applied to OESG by virtue of the McCarran-Ferguson Act. Colbert does nothing to dispute this fact.

THE AMENDMENT OF OKLA. STAT. TIT. 85 §149.1 IS APPLICABLE TO THIS ACTION

Colbert States that the application of the Amendment to Okla. Stat. Tit. 85 §149.1 will destroy an existing defense to this action. As demonstrated above the Oklahoma Securities Laws are not a defense to this action. The Amendment has not taken anything away from Colbert. OESG is not now or has it ever been subject to the Oklahoma Securities Act. The Amendment did nothing but to reiterate what has always been the law – that insurance is not subject to the Securities Act. Therefore, Colbert's citation to the Oklahoma Constitution, Article 5 Section 54 is inapplicable. No defense has been taken away.

CONCLUSION

This case involves a superious [sic] defense and counterclaim on behalf of Colbert Nursing Home, Inc., It is an attempt by Colbert to make slanderous unsupported allegations in order to avoid the payment of a debt owed. OESG has demonstrated that it is not subject to the Oklahoma Securities Act and is not subject to the Federal Securities Act. OESG has fully demonstrated that the bill and the amount owed is correct. Colbert does nothing to dispute the amount of the bill or what is owed. Colbert is

merely trying to avoid payment of a legal obligation by obfuscation.

Respectfully submitted,

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